

(2) CMS evaluates the HMO's or CMP's submittal under paragraph (b)(1) of this section.

(3) The HMO or CMP must promptly notify CMS if there is any change in its enrollment capacity.

(c) *Reserved vacancies.* (1) Subject to CMS's approval, an HMO or CMP may set aside a reasonable number of vacancies for an anticipated new group contract or for anticipated new enrollees under an existing group contract that will have its enrollment period after the Medicare open enrollment period during the contract year.

(2) Any set aside vacancies that are not filled within a reasonable time after the beginning of the group contract enrollment period must be made available to Medicare beneficiaries and other nongroup applicants under the requirements of this subpart.

[50 FR 1346, Jan. 10, 1985, as amended at 58 FR 38079, July 15, 1993; 60 FR 45677, Sept. 1, 1995; 63 FR 35066, June 26, 1998]

§ 417.428 Marketing activities.

(a) *Required marketing activities.* An HMO or CMP must meet the following requirements:

(1) Offer its plan to Medicare beneficiaries and provide to those interested in enrolling, adequate written descriptions of the HMO's or CMP's rules, procedures, benefits, fees and other charges, services, and other information necessary for beneficiaries to make an informed decision about enrollment.

(2) Notify the general public of its enrollment period (whether time limited or continuous) in an appropriate manner through appropriate media, throughout its enrollment area.

(3) Submit all marketing materials to CMS at least 45 days before their planned distribution.

(4) Include in the HMO's or CMP's written materials provided to prospective enrollees prior to enrollment, notice that the HMO or CMP is authorized by law to terminate or refuse to renew its contract with CMS, that CMS may also choose to terminate or refuse to renew its contact with the HMO or CMP and that termination or non-renewal may result in termination of the individual's enrollment in the HMO or CMP.

(b) *Prohibited marketing activities—general.* In offering its plan to Medicare beneficiaries, an HMO or CMP may not engage in any of the following practices or activities:

(1) Practices that are discriminatory. For example, the HMO or CMP may not engage in any activity intended to recruit Medicare beneficiaries from higher income areas (usually an indicator of better health) without making a comparable effort to enroll Medicare beneficiaries from lower income areas.

(2) Activities that could mislead or confuse Medicare beneficiaries, or misrepresent the HMO or CMP its marketing representatives, or CMS. For example, the HMO or CMP may not claim that it is recommended or endorsed by CMS or that CMS recommends that the beneficiary enroll in the HMO or CMP. It may, however, explain that the entity is approved as an HMO or CMP for purposes of participation in Medicare.

(3) Offers of gifts or payment as an inducement to enroll in the HMO or CMP. This does not prohibit the explanation of any legitimate benefits the beneficiary might obtain as an enrollee of the HMO or CMP such as eligibility to enroll in a supplemental benefit plan that covers deductibles and coinsurance or preventive services.

(4) Door-to-door solicitation of Medicare beneficiaries.

(5) Distribution of marketing materials if, before the expiration of the 45-day period described in paragraph (a)(3) of this section, the HMO or CMP receives written notice from CMS that CMS has disapproved the material because it is inaccurate or misleading or it misrepresents the HMO or CMP, its marketing representatives or CMS.

(c) *Marketing activities of risk HMOs or CMPs.* In addition to the generally permitted or prohibited marketing activities described in paragraphs (a) and (b) of this section, a risk HMO or CMP must provide potential Medicare enrollees with adequate written descriptions of the additional benefits or services, or reductions in premiums, deductible or copayments that may pertain under payment on a risk basis.

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